

24 August 2020

Competition Commission
19/F South Island Place
8 Wong Chuk Hand Road
Wong Chuk Hang, Hong Kong

Dear Sir or Madam,

**Comment on the Competition Commission's proposal to
accept commitments proposed by the Hong Kong Seaport Alliance**

On 12 August 2020, the Hong Kong Competition Commission invited the public to comment on its proposal to accept commitments proposed by the Hong Kong Seaport Alliance (Ref. no.: EC/03AY). I would like to seize this opportunity to offer one piece of suggestion. In short, I recommend the Commission study the possibility of requiring the four concerned parties, namely HIT, MTL, CHT & ACT, to commit to terminating their commercial and financial coordination partially or entirely.

As the Commission has explained in the Notice issued under sec. 2 of sch. 2 of the Competition Ordinance, the Hong Kong Seaport Alliance involves (1) operation coordination, (2) commercial coordination and (3) financial coordination.¹ To me, the Commission's anti-competitive concerns largely arise from the commercial and financial coordination² while the claimed efficiencies³ are largely based on the operational coordination.⁴

¹ COMPETITION COMMISSION, NOTICE ISSUED UNDER SECTION 2 OF SCHEDULE 2 TO THE COMPETITION ORDINANCE REGARDING THE COMMISSION'S PROPOSAL TO ACCEPT COMMITMENTS IN THE HONG KONG SEAPORT ALLIANCE CASE (EC/03AY) 4-5 (2020), https://www.compcomm.hk/en/enforcement/consultations/current_consultations/files/EN_Notice_Seaport_Alliance.pdf.

² *Id.* at para. 23 & 27.

³ *See id.* at 14-15 (the claimed efficiencies).

⁴ *Id.* at para. 24 & 27.

The Notice reveals that all the efficiencies identified have resulted from joint planning of berth or yard space.⁵ Prior to the joint planning, the 23 berths owned by the four parties constituted four berth zones at Kwai Tsing port.⁶ Then, the parties “[re-organized their terminals] into three ‘home berths’, each serving the different ‘alliances’ to which their major shipping line customers belong”.⁷ Based on the limited information available, it seems that the same re-allocation and efficiencies could also be achieved without any subsequent commercial and financial coordination (or even without forming a joint venture). First, the parties could agree to only share their infrastructures and some information (e.g., real-time berth and yard availability status).⁸ I understand that the berth/zone re-allocation may benefit certain parties more or at the expenses of the others. However, the beneficial parties could have compensated the others by means of a one-off payment, instead of through a long-lasting co-management and profit-sharing scheme. Second, if each of the “home berths” serves different parties following the re-allocation, then each “home berth” could have been run by the corresponding parties independently. In 2018, three scholars from the Hang Seng University of Hong Kong published a research report titled *Collaboration at the Hong Kong Port – Benefits from Facility Sharing*.⁹ The 2018 report proposes zone allocation at ports in Hong Kong, including at the Kwai Tsing port, which could be accomplished by collaborating on infrastructures and computer systems.¹⁰ Therefore, it is questionable whether the commercial and financial coordination is necessary to achieve the efficiencies claimed.

If it is feasible and sustainable for the concerned parties to operate separately after the redistribution, the Commission should consider requiring the parties to terminate their commercial and financial coordination partially or entirely. Doing so is preferable to simply setting price caps as proposed by the parties because the termination could promote competitive pricing while price caps do not. Now, the parties propose to set the price caps at levels as at 1 April 2019.¹¹ And 1

⁵ *Id.* at 14-15.

⁶ I consider the areas covering CT4, CT6, CT7, CT8W & CT8E as one zone because they were co-managed by HIT before the formation of the Hong Kong Seaport Alliance. *Id.* at 3 & Figure 1.

⁷ *Id.* at 4.

⁸ See COLLIN WONG, HELEN MA & LAWRENCE LEUNG, *COLLABORATION AT THE HONG KONG PORT – BENEFITS FROM FACILITY SHARING* 29 (2018), https://drive.google.com/file/d/1TNHn6lqtXND0IiEiCsZUvGI_GWZCDKXz/view (examples of information needed for collaboration).

⁹ *Id.* at 1.

¹⁰ *Id.* at 16.

¹¹ COMPETITION COMMISSION, *supra* note 1, at 16.

April 2019 was the date when key provisions of the Alliance came into effect.¹² Therefore, one may argue that the prices at 1 April 2019 were competitive and setting price caps at these levels will ensure competitive pricing. While this argument sounds pervasive, it is a misunderstanding of competitive pricing. Despite the prices at 1 April 2019 might be competitive, they may not be competitive prices of today and/or the future. It is because competitive prices are ever changing, subject to the fluctuation of demand and supply of the parties' services. For example, the demand of the parties' services may well have been dropping since 1 April 2019 in light of the worsening economic conditions. If there was price competition between the parties (i.e., no commercial and financial cooperation), then the parties would set prices at *new* competitive levels which fall below the prices at 1 April 2019. However, if the proposed price caps are allowed, then the parties could disregard the pressure on price reduction and fix prices at 1 April 2019 levels, which constitutes monopoly pricing. From this example, we have learned that merely highlighting the effect of the price caps on preventing price increase is not ideal.¹³ Instead, we should also concern the possibility of the price caps being used to cover (or even to facilitate) monopoly pricings.

I understand the operating difficulties the port industry has been facing due to the intensified competition from ports in neighboring areas. Some scholars have pointed out that price is a critical factor for carriers to choose a port for transshipment,¹⁴ and commentators have opined that Hong Kong's ports are losing in the growing competition because they lack price competitiveness.¹⁵ To gain price competitiveness, the parties reduce cost, such as by zone allocation, is one valid approach. However, ensuring price competition among the parties at the Kwai Tsing port could enhance their competitiveness too. The key here is that the two price-reduction mechanisms could co-exist. If the Commission adopt my proposal, not only the parties could continue to enjoy cost efficiencies from zone allocation but remain subject to intra-port

¹² *Id.*

¹³ *See id.* at 17 (example of such highlights).

¹⁴ COLLIN WONG, HELEN MA & LAWRENCE LEUNG, *supra* note 8, at 10.

¹⁵ *The Three Major Container Terminal Companies Form the Seaport Alliance to "Self-Help" Reflecting the Survival Crisis of the Port Industry* [三大貨櫃碼頭公司組海港聯盟「自救」折射港口業存亡危機], HK01 [香港01], Jan 11, 2019, <https://www.hk01.com/%E5%AE%8F%E8%A7%80%E8%A7%A3%E8%AE%80/281539/%E4%B8%89%E5%A4%A7%E8%B2%A8%E6%AB%83%E7%A2%BC%E9%A0%AD%E5%85%AC%E5%8F%B8%E7%B5%84%E6%B5%B7%E6%B8%AF%E8%81%AF%E7%9B%9F-%E8%87%AA%E6%95%91-%E6%8A%98%E5%B0%84%E6%B8%AF%E5%8F%A3%E6%A5%AD%E5%AD%98%E4%BA%A1%E5%8D%B1%E6%A9%9F>.

competition. Intra-port competition will drive inter-ports competition and help promote the competitiveness of Hong Kong's port industry.

To conclude, I suggest the Commission review the necessity of the commercial and financial coordination in preserving the claimed efficiencies. If the current level of integration among the parties is unnecessarily high, the Commission should seek better commitment terms to restore competition in the relevant markets.

Should you have any questions regarding the above, please feel free to contact me.

Yours faithfully,

Sinchit Lai